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|---------------------------|---|----------------------------|
| JASON L. THOMAS, |) | No. C 06-05543 JF (PR) |
| |) | |
| Plaintiff, |) | ORDER OF SERVICE; ORDER |
| |) | DIRECTING DEFENDANTS TO |
| vs. |) | FILE DISPOSITIVE MOTION OR |
| |) | NOTICE REGARDING SUCH |
| CAROLE M. PATTEN, et al., |) | MOTION |
| |) | |
| Defendants. |) | |
| |) | (Docket No. 11) |

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a

1 claim upon which relief may be granted or seek monetary relief from a defendant who is
2 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
3 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
4 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
6 elements: (1) that a right secured by the Constitution or laws of the United States was
7 violated, and (2) that the alleged violation was committed by a person acting under the
8 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

9 **B. Plaintiff's Claims**

10 Having reviewed the complaint, the Court finds that Plaintiff's allegations,
11 liberally construed, state cognizable claims that Defendants violated his Eighth
12 Amendment rights by using excessive force, acting with deliberate indifference to his
13 serious medical needs and his personal safety (claims one, two and three), violated his
14 First Amendment right to access the courts and communication (claims four and six), and
15 violated his right to due process by filing false reports (claim five).

16 Plaintiff names "Doe" Defendants in his complaint. The use of Doe defendants is
17 not favored in the Ninth Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
18 1980). However, where the identity of alleged defendants cannot be known prior to the
19 filing of a complaint the plaintiff should be given an opportunity through discovery to
20 identify them. Id. Failure to afford the plaintiff such an opportunity is error. See
21 Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999). Accordingly, the claims
22 against the Doe Defendants are dismissed from this action without prejudice. Should
23 Plaintiff learn the identity of any of these individuals through discovery, he may move to
24 file an amendment to the complaint to add them as named Defendants. See Brass v.
25 County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

26 **C. Motion to Withdraw**

27 Plaintiff filed a motion to withdraw his first amended complaint on October 29,
28 2007. (Docket No. 11.) Then on November 9, 2007, Plaintiff filed the instant first

1 amended complaint. (Docket No. 12.) As it appears that Plaintiff wishes to pursue this
 2 action, the motion to withdraw the amended complaint is DISMISSED as moot.

3 4 **CONCLUSION**

5 For the reasons stated above, the Court orders as follows:

6 1. All claims against “Doe” Defendants are DISMISSED without prejudice
 7 and with leave to amend.

8 2. The Clerk of the Court shall issue summons and the United States Marshal
 9 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
 10 attachments thereto, and a copy of this order upon **J. Woodford, Director, California**
 11 **Dept. of Corrections and Rehabilitation; Pelican Bay State Prison Warden**
 12 **Kirkland; Carole M. Patten, Correctional Facility Captain at Pelican Bay State**
 13 **Prison; Glen Shipley, Head Medical Psychiatrist at Pelican Bay State Prison;**
 14 **Sergeant J. Akin at Pelican Bay State Prison; Sergeant J. Sauny at Pelican Bay State**
 15 **Prison; and Correctional Officers A. Cardoza, D. Castillo, and A. Ford at Pelican**
 16 **Bay State Prison.** The Clerk shall also mail courtesy copies of the complaint and this
 17 order to the California Attorney General’s Office.

18 3. No later than **ninety (90) days** from the date of this order, Defendants shall
 19 file a motion for summary judgment or other dispositive motion with respect to the claim
 20 in the complaint as set forth above.

21 a. If Defendants elect to file a motion to dismiss on the grounds that
 22 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
 23 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
 24 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
 25 Terhune, 540 U.S. 810 (2003).

26 b. Any motion for summary judgment shall be supported by adequate
 27 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
 28 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**

nor qualified immunity found, if material facts are in dispute. If any Defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

a. In the event Defendants file an unenumerated motion to dismiss under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

The Defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the Defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event Defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to Plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents

¹The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 and show that there is a genuine issue of material fact for trial. If you do
2 not submit your own evidence in opposition, summary judgment, if
3 appropriate, may be entered against you. If summary judgment is granted
in favor of defendants, your case will be dismissed and there will be no
trial.

4 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
5 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
6 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
7 evidence showing triable issues of material fact on every essential element of his claim).
8 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
9 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
10 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
11 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

12 5. Defendants shall file a reply brief no later than **fifteen (15) days** after
13 Plaintiff's opposition is filed.

14 6. The motion shall be deemed submitted as of the date the reply brief is due.
15 No hearing will be held on the motion unless the Court so orders at a later date.


16 7. All communications by the Plaintiff with the Court must be served on
17 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
18 copy of the document to Defendants or Defendants' counsel.

19 8. Discovery may be taken in accordance with the Federal Rules of Civil
20 Procedure. No further Court order is required before the parties may conduct discovery.

21 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
22 Court informed of any change of address and must comply with the Court's orders in a
23 timely fashion. Failure to do so may result in the dismissal of this action for failure to
24 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

25 IT IS SO ORDERED.

26 DATED: 6/25/08

27 
JEREMY FOGEL
United States District Judge